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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 97

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

v.

BOSTON AND MAINE RAILROAD, ET AL.

No. 98

MARYLAND PORT AUTHORITY, ET AL.

v.

BOSTON AND MAINE RAILROAD, ET AL.

No. 99

INTERSTATE COMMERCE COMMISSION

v.

BOSTON AND MAINE RAILROAD, ET AL.

MOTION TO AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 923

THE BALTIMORE AND OHIO RAILROAD COMPANY, *et al.*

v.

BOSTON AND MAINE RAILROAD, *et al.*

No. 924

MARYLAND PORT AUTHORITY, *et al.*

v.

BOSTON AND MAINE RAILROAD, *et al.*

No. 925

INTERSTATE COMMERCE COMMISSION

v.

BOSTON AND MAINE RAILROAD, *et al.*

MOTION TO AFFIRM

The Appellees, Boston and Maine Railroad; The New York, New Haven and Hartford Railroad Company

Dorigan, Trustees); The New York Central Railroad Company; The Delaware and Hudson Railroad Corporation; Erie-Lackawanna Railroad Company; Grand Trunk Railway System—Lines East (Canadian National Railway Company); New York, Susquehanna and Western Railroad Company; the Massachusetts Port Authority; the State of New York; The Port of New York Authority; the City of New York; Chamber of Commerce of The State of New York; Brooklyn Chamber of Commerce, Inc.; Belleville Manufacturers' Association; Bergen County Chamber of Commerce; The Bronx Board of Trade; Chamber of Commerce, Garfield, New Jersey; Chamber of Commerce, Irvington, New Jersey; Chamber of Commerce of Eastern Union County; Clifton Chamber of Commerce; Commerce and Industry Association of New York, Inc.; Hoboken Chamber of Commerce; Ironbound Manufacturers' Association, Inc.; The Maritime Association of the Port of New York; Newark Association of Commerce and Industry; New Jersey Industrial Traffic League; New York Board of Trade; New York Shipping Association, Inc.; Queensborough Chamber of Commerce; The Shippers' Conference of Greater New York; The West New York Chamber of Commerce; and West Side Association of Commerce in the City of New York, pursuant to Rule 16, paragraph 1(c), of the Revised Rules of the Supreme Court; move that the judgment of the United States District Court for the District of Massachusetts be affirmed on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Background and Nature of the Proceedings

The pertinent facts as they appear from the reports of the Commission (311 I.C.C. 689 and 314 I.C.C. 185)[1]

[1] These decisions are reproduced as a separate volume Appendix to the three jurisdictional statements of appellants.

and the opinion of the District Court, reproduced as appendix 1 hereto, are as follows:

The differential in rates here in issue was the result of an agreement entered into by North Atlantic port railroads in 1877. At that time ocean rates to the southern tier ports were higher than to the northern tier ports and the object of the agreement was "to avoid misunderstanding as to the geographical advantages or disadvantages of New York, Philadelphia and Baltimore as affected by railroad-ocean transportation, and to effect an equalization of rail-ocean transportation cost between interior points and foreign ports reached through those cities." Boston rates, under this agreement, were to be no less than those to and from New York.

Beginning in the early 1920's and extending to about 1935, ocean rates to and from the different ports gradually were equalized and the total transportation charge through the northern tier ports consequently became higher than the combined cost of rail and ocean transportation through a southern tier port (App. 1, p. 31).

Subsequent to the period during which the ocean rates to and from all North Atlantic Ports were equalized there was a decline in the participation of the northern tier ports (New York, Albany, Boston and Portland) in the percentage of total United States imports and exports and an increase in the participation in such traffic by the southern tier ports, namely, Baltimore, Philadelphia and Hampton Roads, to the south of New York. During this period, New York's share of the total United States tonnage declined from 28.6 percent in 1923 to 14 percent in 1955. Boston's participation dropped similarly from 4.7 percent to 2.5 percent. On the other hand, the share of the southern tier ports of total United States imports and exports increased as follows: Philadelphia from 7.9 to 15.7 percent, Baltimore from 8.4 to 10.4 percent, and Hampton Roads from 4.3 to 17.1 percent. Since these figures are not limited to Affected Territory traffic, nor to rail traffic, they

only serve as an indication of the trend in import/export traffic movement (App. 1, pp. 33-34). In order to present a clearer and more complete picture of competitive rail traffic between all North Atlantic ports and Affected Territory, the railroads conducted traffic studies during 1955-56 which showed that, exclusive of iron ore and coal, 75.8 percent of the imports and 63.7 percent of the exports moved through the southern tier ports. Similar studies for the years 1946 and 1947, when compared with the 1955-56 study, indicate a downward trend of import/export traffic to and from Affected Territory over the lines of appellee railroads serving New York (App. 1, p. 34).

The rates in issue were published by appellee railroads to halt the trend of declining import/export traffic and to become competitive with the appellant rail lines serving the southern tier ports (App. 1, p. 31). The proposed rates are on a parity with those maintained by the railroads serving Baltimore and Hampton Roads, and would restore the equality of through ocean-rail transportation costs which was disrupted between 1920 and 1935, which disruption still continues.

The differentials between the rates of appellant railroads and appellee railroads which would be eliminated by the proposed rates of appellees were carrier-made and not prescribed by the Commission. Until the pronounced loss of traffic since World War II made the elimination of the differentials imperative, the carriers had successfully defended the differentials against attack by various port interests since their inception in 1877. The original justification for the differentials, namely that of providing equal rail-ocean transportation charges through all North Atlantic ports, having long since disappeared and the adverse effects of the differentials favoring the railroads serving the southern tier ports having been amply demonstrated, the proposed differential-eliminating rates were published (311 I.C.C. 689, 697-8).

The only issue here is the lawfulness of the proposed equalized rail rates which would restore the equality of through ocean-rail transportation charges as first established by the railroads in 1877.

The Questions Propounded by Appellants Are Unsubstantial

The proposed differential-eliminating rates are opposed by the southern tier port interests and the railroads serving those ports because particularly, since World War II, both interests have prospered greatly at the expense of their non-competitive rivals to the north.

The key to an understanding of the questions presented by the three groups of appellants is found in the statement at pages 2 and 3 of the Jurisdictional Statement of the Commission that "The purpose of the rate reductions was to eliminate long-established rate differentials *favoring* Philadelphia, Baltimore and Hampton Roads (the southern tier ports) on such traffic." [Italics supplied]

Similarly, in the Jurisdictional Statement of the appellant railroads, at pages 10 and 11, appears the candid admission that "[The Commission's] primary reason for finding a section 3(1) violation was to preserve the *one and only competitive advantage* of the outports of Philadelphia, Baltimore, and Hampton Roads and *thus to prevent a further erosion of traffic* * * *" to the port of New York. [Italics supplied]. The traffic studies recited hereinbefore from the District Court opinion belie the statement as to preventing "further erosion to New York", and affirmatively establish, as recognized by the lower Court, that the "competitive advantage" of the railroads serving the southern tier ports is a very real and serious obstacle to effective competition by the appellee railroads for the subject traffic. The facts of this case, Commission precedent, its statutory obligations, Congressional directives and leading and authoritative decisions of this Court required

the District Court reversal of the Commission's decision which would have perpetuated the rates favoring the railroads serving the southern tier ports.

The questions presented by the Commission are in substance the same as those of the other appellants. These questions therefore will be dealt with. Such treatment will disclose that all questions presented are unsubstantial.

The questions presented by the Commission are:

1. Whether the District Court erred in rejecting the Commission's conclusion that the proposed differential-eliminating rates would be unduly prejudicial to the southern tier ports in violation of Section 3(1) of the Interstate Commerce Act, in view of the Commission's findings that (a) the railroads serving the southern tier ports enjoy advantages of distance and cost, (b) that under parity rates, such railroads could not compete for such traffic with the railroads serving the northern tier ports, and there would be an undue diversion of such traffic from the southern tier ports to New York?

2. Whether the District Court erred in setting aside the Commission's order on the grounds that the Commission (a) failed to give sufficient weight to the interests of shippers, receivers, carriers, and inland communities, (b) gave undue weight to the distance disadvantages of the northern tier ports and to the effect of the proposed rates upon the competitive position of the various ports, and (c) failed to find that the distance disadvantages of the railroads serving the northern tier ports reflect cost disadvantages?

3. Whether the District Court erred in finding that the railroads serving the northern tier ports had met their burden under Section 15(7) of establishing that their proposed rates would be just and reasonable, thereby assuming a primary function of the Commission?

4. Whether in investigating proposed rates under Section 15(7), the Commission must permit railroads to compete for import and export traffic without regard to Section 3(1) and other standards for determining the lawfulness of rates?

5. Whether the District Court erred in rejecting or ignoring the Commission's conclusion that approval of the proposed rates, notwithstanding the distance and cost disadvantages of the railroads serving the northern tier ports, would require approval of corresponding rate reductions proposed by the railroads serving the southern tier ports to maintain the differentials at a lower rate level, thereby producing destructive competition and needless dissipation of carrier revenues?

It is important to bear in mind that the agreement providing for the differentials in 1877 was a voluntary act of the carriers involved and constituted recognition of then prevailing conditions. Its purpose was to provide equality of total rail-ocean transportation charges through all of the North Atlantic ports. As the Commission recognized in an early attack on the differentials, "We are not to be understood as holding that the present rate adjustment will for all time or for any particular period of time be just and reasonable, * * *." *Chamber of Commerce of N. Y. v. N.Y.C. & H. R. R.R. Co.*, 24 I.C.C. 55, 57 (1912). Thus, there is nothing sacrosanct in the rate differentials which now, because of changed conditions, so overwhelmingly favor the railroads serving the southern tier ports and now in fact defeat the very purpose for which they were originally established.

Contrary to the contentions advanced by appellants, the District Court did not substitute its judgment for that of the Commission, but did hold that the Commission had improperly performed its functions as an administrative body. The District Court concluded that the Commis-

sion's Section 3(1) finding and the order based thereon were erroneous in law and lacked the rational basis necessary to uphold it. The District Court acted after full review of the pertinent and governing facts of record and in complete accord with this Court's ruling "that a reviewing Court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view" *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474, 488 (1951). In urging the principle of "administrative finality", some of appellants would have the District Court judges be "automata" or "the judicial echo of the Board's conclusion" *Universal Camera Corp.* v. *Labor Board*, *supra*, 491.

All of the appellants' questions and statements in connection therewith urge that the reviewing Court must accept the Commission's ultimate conclusion even though the reasons therefor are not apparent from its reports nor justified from the record as a whole. Significantly, no attack is made upon the facts, legal precepts and governing cases cited by the Court as requiring reversal of the Commission's decision.

The Court Below Properly Disposed Of All Issues

The appellees' attack upon the decision and order of the Interstate Commerce Commission in the District Court was upon the grounds that it was erroneous in law, unsupported by essential basic findings and unsupported by substantial evidence on the record as a whole (App. 1, p. 32).

The District Court recognized that appellee railroads, under 49 U.S.C., § 15(7), had the burden of showing that the proposed rates are "just and reasonable" within the

meaning of Section 1(5), free from unjust discrimination prohibited by Section 2 and that they contain no undue preference or prejudice proscribed by Section 3(1) (App. 1, p. 33).

It is a basic principle that railroads may freely adjust their rates to meet competition so long as they are within the so-called zone of reasonableness and meet the other tests of lawfulness recognized by the District Court. *U. S* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 506 (1935) and *Texas & Pacific Ry. Co.* v. *U. S.*, 289 U. S. 627, 635-637 (1933).

The District Court properly held, after review of the record, that appellee railroads had met, on a *prima facie* basis, their burden of establishing that the proposed rates were just and reasonable and that the Commission's sole basis of condemnation under Section 3(1) was erroneous in law and lacked the rational basis to uphold it.

The allegations of error as set forth on pages 5 through 7 hereof will be discussed seriatim.

1. (a) Are appellees' rates unduly prejudicial of the southern tier ports in violation of Section 3(1) upon the Commission's finding that the railroads serving the southern tier ports enjoy advantages of distance and cost?

It is elementary, of course, that, under the Commission's rule-of-thumb cost-finding formula known as Form A, the shortest rail line between any two points is automatically the low-cost carrier. The formula adds an increment of average cost for every mile traveled to average costs for the terminal handling at each end of the journey. The average eastern district rail costs which are the basis of the Commission's Form A do not take into consideration individual route variations based on the terrain traversed (mountainous versus water-level routes), density of traffic on particular railroads, or partial use of special facilities, etc.

In this regard the fundamental error found by the District Court in the Commission's purported basis for its Section 3(1) finding is that relating to the "distance disadvantage" of the northern tier railroads.

In its opinion (App. 1, pp. 37 to 39), the Court discusses this "distance disadvantage" of the northern tier railroads as follows:

> "The Commission in reaching the conclusion that the proposed rates violate section 3(1) relies on a single subsidiary finding—the distance disadvantage of the northern tier ports. In the light of the history of the differential, earlier decisions of the Commission concerning it, the original report issued in this case, and the facts of this case, this finding in the Report on Reconsideration and its import are somewhat difficult to understand and, in view of the applicable law, erroneous. In the first place, the differential was established to place all North Atlantic ports on a parity with respect to the aggregate of rail and ocean charges. No consideration whatever was given to disparity in rail distances then or later. On the contrary, when the Thurman-Cooley-Washburn Advisory Commission concluded in 1882 that the differentials should remain, it specifically rejected the 'distance principle' as controlling port relationships and rested its award on the principle of 'competitive opportunity'.
>
> "Until it filed its Report on Reconsideration in this proceeding, the Commission, itself, has continually adhered to the proposition that distance plays no part in the determination of port differentials. It so stated even in its original report: 'Such distance disadvantages as they (the northern tier ports) have are much less than the substantial differences to and from some other ports which have a parity or near parity of rates, including the Canadian ports, and the wide differences which obtain where the several South Atlantic and Gulf ports are equalized . . . It is apparent that

considerable disregard of rail distances is characteristic of all port adjustments, as it was in the establishment of the rates here dealt with.' Equalization of Rates, *supra* [311 I.C.C. 689], at 715, 716.

"Even while proclaiming this new rule, the Commission ignores it. Import rates from Portland[*] may remain on a parity with Baltimore in spite of a distance disadvantage of more than 300 miles.[**] Moreover, the present differentials do not in any way reflect the distance differences.

"Secondly, one of the purposes of the 1935 amendment to section 3 was, as the Commission had previously pointed out, Equalization of Rates, *supra*, at 716 and cites therein, to permit all ports and the carriers serving them to compete for all import and export traffic and thereby maximizing the number of ports available. The finding in this case, if pressed to its logical conclusion, would result in traffic flowing only through the most distance favored port. On the other hand, if applied only in this case, the decision is arbitrary and capricious." [Footnotes added by appellees].

In its condemnation of the Commission's Section 3(1) finding, the Court quite properly accepted principles heretofore recognized by the Commission and well established

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[*] To say, as do certain appellants, that the Portland parity rates are made in conjunction with Canadian carriers and that the Commission has no jurisdiction over Canadian rates is highly misleading. The Commission has such jurisdicton where, as here, joint through rates to United States points are involved. See *Porter Co.* v. *Central Vermont R. Co.*, 366 U. S. 272, 275 (1961).

[**] It is also noteworthy that the Commission in its Report on Reconsideration pointed out that the average distance between Hampton Roads and its differential territory is 883 miles as compared with 853 miles to New York (314 I.C.C. 188). Yet, the Commission approved continuation of lower rates between Hampton Roads and its differential territory.

in law. Thus, in *Baltimore Chamber of Commerce* v. *Ann Arbor R. Co.*, 159 I.C.C. 691 (1929), the Commission stated (p. 696):

> "We can not make rates that will yield to each carrier serving the same port, or each group of carriers serving different ports, substantially the same rate of profit on the same character of traffic. To attempt to do so is to ignore the best interests of the carriers, the ports, and particularly the shippers, it being of prime importance to the latter that they have as many routes to each port and as many ports as possible available for their traffic, which they can not have if rates are to be made so as to yield substantially the same profit to each carrier or group of carriers for particular services."

And, in the export Ex-Lake Grain case, *New York Cent. R. Co.* v. *United States*, 99 F. Supp. 394 (1951), affirmed 342 U.S. 890, the Massachusetts District Court pointed out at page 402:

> "It is conceivable that the railroads serving New York absorb a greater amount of expense out of their line-haul rate than do the Baltimore and Philadelphia railroads and thus under a system of equal rates would receive a lower net return. But on the record before the Commission and the history of the differential, a holding of undue prejudice on the basis of terminal costs would not have been warranted. As pointed out previously, such costs played no part in the establishment of the differentials by the Commission in the 1905 proceeding. * * *"

Similarly, in *Texas & Pacific Ry. Co.* v. *U. S., supra*, 289 U. S. 627 (1933), this Court pointed out at page 639:

> "The legislative history of the Act demonstrates that Congress did not intend to forbid the equalization of export or import rates by lines serving several ports

in order to meet competition. These rates, it was said, were not to be proportioned to the respective distances between inland origins or destinations and the ports.'"

The footnote cited reads as follows:

"'"See the explanation of Senator Cullom, chairman of the Committee having charge of the original bill, Cong. Rec., 49th Cong., 1st Sess., Vol. 17, Part 4, pp. 3471, 3472. House proceedings, Cong. Rec., Vol. 17, Part 7, pp. 7277, 7294, 7298. And see the Report of the Committee of the Senate, Report No. 46, 49th Cong., 1st Sess., p. 57, referring to the investigation by a committee of the British Parliament:

"'Other important conclusions were reached by the Committee as follows:

"' ' "That a system of equal mileage rates, or charges in proportion to distance, was inexpedient and impracticable for the following reasons:

"' ' "(a) It would prevent railway companies from lowering their fares and rates, so as to compete with traffic by sea, by canal, or by a shorter or otherwise cheaper railway, and would thus deprive the public of the benefit of competition, and the company of a legitimate source of profit.

* * * * *

"' ' "In short, to impose equal mileage on companies would be to deprive the public of the benefit of much of the competition which now exists, or has existed, to raise the charges on the public in many cases where the companies now find it to their interest to lower them, and to perpetuate monopolies in carriage, trade, and manufacture in favor of those rates and places which are nearest or least expensive where the varying charges of the companies now create competition." ' "

The Court's treatment of the Section 3(1) issue is entirely consistent with the above authorities and the legislative history of the 1935 amendment to Section 3(1) as shown in the Senate and House Reports, attached hereto as Appendices 3 and 4.

1. (b) Are appellees' rates unduly prejudicial to the southern tier ports in violation of Section 3(1) upon the Commission's finding that under parity rates, such [southern tier] railroads could not compete for such traffic with the railroads serving the northern tier ports, and there would be an undue diversion of such traffic from the southern tier ports to New York?

Here is the type of pure conjecture that this Court has repeatedly held improper. See *U. S.* v. *Chicago, M., St. & P. R. Co.*, 294 U. S. 499, 506-8 (1935).

The fact of the matter is that under the present rates the northern tier railroads are non-competitive. Appendix F of the Commission's original report indicates that the railroads serving New York are participating in 29.3 per cent of the export traffic and but 23.1 per cent of the import traffic to and from the affected territory (311 I.C.C. 689, 751). In fact, as a group, the northern tier railroads participate in only 36.3 percent of the export traffic and 24.2 percent of the import traffic from the same territory.

The District Court treated this question as follows:

> "The Commission disapproved the plaintiffs' proposal on the additional ground that, insofar as New York is concerned, equalization is not necessary to enable that port to compete. This conclusion again is based on a misunderstanding of the nature of the proceedings. While the New York Port Authority and other New York governmental and commercial interests were undoubtedly active participants in the case, the primary issue is whether equalization is necessary to enable the plaintiff railroads to compete. And the

evidence showed that the share of traffic handled by these railroads has been declining.

"The last reason given in support of its decision is that with respect to the ports of Boston, Albany and Portland, 'equalization would not materially affect the flow of traffic to these ports.' Not only does this statement completely contradict the Commission's ultimate conclusion of undue prejudice to the southern tier ports, but it ignores the plaintiffs' right to attempt to gain some of this traffic for their lines." (App. 1, p. 40)

2. (a) Whether the District Court erred in setting aside the Commission's order on the grounds that the Commission failed to give sufficient weight to the interests of shippers, receivers, carriers, and inland communities?

The District Court opinion, after noting that the Commission had disallowed the proposed rates principally on the ground that the rates would violate Section 3(1), cited the pertinent provisions of Section 3(1) and then observed:

"In one of the earliest cases to come before the Supreme Court under this Act, the Court said that when presented with a question of unjust discrimination, the Commission is to 'take into consideration all the facts of the given case—among which are to be considered the welfare and advantage of the common carrier, and of the great body of the citizens of the United States. . . . The Commission is not only to consider the wishes and interests of the shippers and merchants of large cities, but to consider also the desire and advantage of the carriers in securing special forms of traffic, and the interest of the public that the carriers should secure that traffic, rather than abandon it, or not attempt to secure it.' *Texas & Pac. Ry.* v. *I.C.C.*, 162 U. S. 197, 218 (1896). In 1940, Congress, by adding the National Transportation Policy, 49 U.S.C., affirmed and reiterated the view that the Act must be

interpreted as a whole and the competing interests of shippers, carriers, and localities carefully balanced to the end of developing a national transportation system. . . .

"While apparently recognizing these principles, the Commission, in this case, nonetheless wholly ignored them. It noted the voluminous testimony of shippers and receivers in favor of equalization, but in its conclusions completely disregarded this evidence. It considered the need of the plaintiffs and their competitive disadvantage, but discounted both in its findings. Its final decision rests solely on the proposition that some ports would be unduly preferred and others unduly prejudiced by the proposed rates.

"In emphasizing the welfare of ports and port districts, the Commission apparently relied on the 1935 amendment to section 3(1) which added 'ports, port districts, gateways and transit points', to the interests protected by that section.

"In *Texas & Pac. Ry.* v. *United States*, 289 U. S. 627 (1933), the Supreme Court had held that the word 'locality' referred to 'points of origin or destination' and did not include gateways. The purpose of the amendment was only to restore to the Commission a power which it had previously exercised, but which the Supreme Court had held the Commission did not have. Neither the legislative history nor the plain words of the amendment indicate that any change in the prevailing rules respecting undue preference and prejudice or any special treatment of ports and port districts was intended.

"We find that the Commission erred in applying section 3(1) too narrowly and in not giving due weight to the interests of shippers, receivers, carriers, and inland localities." (App. 1, pp. 36-37)

The District Court was correct in its insistence upon an evaluation by the Commission of all the interests that should be considered under Section 3(1).

2. (b) Whether the District Court erred in setting aside the Commission's order on the grounds that the Commission gave undue weight to the distance disadvantages of the northern tier ports and to the effect of the proposed rates upon the competitive position of the various ports?

The distance aspect of this question has been discussed under 1(a) hereinabove, and the competitive aspect under 1(b).

Another important consideration is the fact that the Commission's ultimate findings have the actual effect of apportioning traffic among the ports and railroads, and the facts of record present a clear showing that the Commission has actually preferred unduly the southern tier ports and has prejudiced unduly the northern tier ports.

Without conceding that the Commission has statutory authority to directly allocate traffic between ports and carriers, the following observations of Commissioner Webb in his dissenting opinion to the original Commission decision herein are pertinent to this discussion. At pages 744 and 745, Commissioner Webb states:

> "Another advantage of rate equalization is that the Interstate Commerce Commission has less occasion to apportion traffic among the ports involved. Where, as here, the required rate differential is not justified solely on distance or cost of service considerations, apportionment of traffic is inherent in the fixing of the differential. • • • In forcing continuance of the rate handicap, the majority has necessarily determined that each of the carriers and ports involved is presently enjoying a fair share of the available traffic.
>
> • • • •
>
> "Adherence to the great principle of rate equalization requires disapproval of the retaliatory reductions proposed by the carriers serving the ports of Philadelphia, Baltimore, and Hampton Roads, their cost and

distance advantages to the contrary notwithstanding. If the dire predictions of these carriers and ports should begin to materialize in the wake of rate equalization, a remedy is provided by section 3(1) of the act. * * * Rate equalization is the rule. Exceptions to the rule should not be prescribed on the basis of conjectural harm.

"Even if it were proper to apportion traffic in this proceeding, the allocation effected by the majority seems inequitable. As shown by appendix F (which does not include substantial tonnages of export coal and import iron ore moving through the southern tier ports), rail exports from the affected territory through New York amounted to only 29.3 percent of the total and imports through New York to the affected territory amounted to only 23.1 percent of the total. It is no answer to say that New York continues to handle over 60 percent of the so-called 'highly desirable general-cargo tonnage'. The report recognizes that the exportation and importation of bulk commodities is increasing while 'the movement of United States manufactures to foreign markets has been steadily declining'. Moreover, the majority recognizes that the general cargo which moves predominantly through the port of New York is the most expensive type of traffic to handle and, in fact, that such traffic provides a return which is only barely compensatory.

"These conclusions appear to restrict New York and the other northern tier ports to a shrinking class of traffic which is the most expensive to handle. Bulk commodities do not move freely against a rate differential. Railroads are volume carriers. To deny the respondents an opportunity to participate in the movement of bulk cargoes is a denial of their most important inherent advantage. Furthermore, any prospect of relief in the future seems remote. If, as the majority finds, the proposed adjustment would

unduly prefer Boston, Portland, and Albany, which collectively handle only 6.9 percent of the involved exports and only 1.1 percent of the affected imports, the rate handicap of New York must be regarded as relatively permanent in nature."

It is clear from the foregoing that the District Court, as did dissenting Commissioner Webb, gave consideration to incontestable facts of record which demonstrated conclusively that the Commission decision not only gave "*undue* weight . . . to the effect of the proposed rates upon the competitive position of the various ports", but that the Commission in its decision *ignored* those conclusive facts in reaching its erroneous conclusions.

2. (c) Whether the District Court erred in setting aside the Commission's order on the grounds that the Commission failed to find that the distance disadvantages of the railroads serving the northern tier ports reflect cost disadvantages?

This question as presented must refer to the District Court's comments (App. 1, pp. 39 and 40) where it was discussing the fact that the Commission had failed to distinguish between rates which carriers may voluntarily publish to meet competition pursuant to section 15(7) and rates which carriers, on complaint under section 3(1) may be required to change. The discussion of the District Court is as follows:

> "It is now well established that carriers may, within the zone of reasonableness, adjust rates to meet competition—*United States* v. *Chicago, M., St. P. & P. R. R.*, 294 U. S. 499, 506 (1935); *Texas & Pac. Ry.* v. *United States*, 289 U. S. 627, 636 (1933); *New York Cent. R. R.* v. *United States*, 99 F. Supp. 394 (D. C. Mass. 1951)—in which case the issue to be decided is whether the *proposed* rates are lawful. In a complaint proceeding the question is whether the

existing rates are lawful and, if not, whether they should be required to be changed. However, both the Report and the Report on Reconsideration give continuous indication that the Commission regarded this as a 'port' case, not a 'railroad' case. For example, the observation that 'in the rare instances where rate changes in port relationships have been required by us, distance has been an important consideration', p. 21, Recon., while perhaps true, was totally irrelevant to the issues before it. Distance differences might be relevant insofar as they reflect differences in the cost and value of the services of plaintiff and defendant railroads, see *United States* v. *Illinois Cent. R.R.*, 263 U. S. 515, 524 (1924), but the Commission made no such cost or value findings nor does the record contain evidence from which it could make such findings. We must, therefore, rule that its conclusion lacks the required basic findings to support it."

The District Court obviously had reference to the fact that the Commission, having found that the proposed rates would produce revenues equal to or above out-of-pocket costs, could not use the mere fact of a distance disadvantage as a basis for a section 3(1) finding of undue preference. The Court's observation that "Distance differences might be relevant insofar as they reflect differences in the cost and value of the services of plaintiff and defendant railroads" is a continuation of its distinction between a Section 15(7) proceeding and a complaint brought by a port, locality, or shipper alleging preference or prejudice under Section 3(1). In a Section 3(1) complaint proceeding, the Commission, as the Court recognizes, could properly find that a rate difference maintained between different points is justified and proper where greater distance, and its concomitant greater costs to the carrier, are shown as a matter of record. But the Court goes on to point out the irrelevance of a finding as to higher costs due

to greater distances in a Section 15(7) proceeding, as here, where the carriers deem the absorption of such higher costs necessary if they are to effectively compete at rates otherwise lawful.

Consequently, even if the Court had held that the Commission correctly found that the distance disadvantage of the railroads serving the northern tier ports reflected cost disadvantages, it would not follow that the Court would have had to sustain the Commission's order. This Court and the Commission have long upheld the right of a carrier to compete for traffic with a rate-setting carrier having a distance advantage, e.g. *Texas & Pacific Ry. Co.* v. *U. S.*, 289 U. S. 627, 639 (1933); *Baltimore Chamber of Commerce* v. *Ann Arbor R. Co.*, 159 I.C.C. 691, 696 (1929).

3. Did the District Court err in finding that the railroads serving the northern tier ports had met their burden under Section 15(7) of establishing that their proposed rates would be just and reasonable, thereby assuming a primary function of the Commission?

As pointed out in the District Court's opinion (App. 1, p. 33):

> "Under 49 U.S.C. §15(7), the plaintiffs had the burden of proof to show that the proposed rates are 'just and reasonable' within the meaning of section 1(5), free from unjust discrimination prohibited by section 2 and that they contain no undue preference or prejudice proscribed by section 3(1)."

The Commission based its disapproval of the proposed equalized rates to and from the northern tier ports solely on its erroneous finding that they would result in undue preference and prejudice in violation of Section 3(1). The Commission made no finding that the proposed equalized rates would not be "just and reasonable" within the meaning of Section 1(5).

In reviewing the Commission's decision and order, the District Court indicated its agreement with the Commission that no basis existed on the record for a finding that the proposed rates would be unjust and unreasonable under Section 1(5), observing in this connection:

> "... plaintiffs certainly established *prima facie* that the proposed rate schedule is just and reasonable."

Approval by the reviewing Court of the Commission's refusal to condemn the rates under Section 1(5) can hardly be termed a usurpation by the District Court of a primary function of the Commission.

4. Whether in investigating proposed rates under Section 15(7), the Commission must permit railroads to compete for import export traffic without regard to Section 3(1) and other standards for determining the lawfulness of rates?

Contrary to the allegation of appellants, the District Court in its opinion made it abundantly clear that in investigating proposed rates under Section 15(7), the Commission must give due regard to Section 3(1) and other standards for determining the lawfulness of rates as set forth in the Interstate Commerce Act.

In its opinion, as mentioned above, the Court stated:

> "Under 49 U.S.C. § 15(7), the plaintiffs had the burden of proof to show that the proposed rates are 'just and reasonable' within the meaning of section 1(5), free from unjust discrimination prohibited by section 2 and that they contain no undue preference or prejudice proscribed by section 3(1)." (App. 1, p. 33)

Later, the Court observed:

> "In 1940, Congress, by adding the National Transportation Policy, 49 U.S.C., affirmed and reiterated the view that the Act must be interpreted as a whole and

the competing interests of shippers, carriers, and localities carefully balanced 'to the end of developing a national transportation system . . .'" (App. I, pp. 36-37).

Thus, the District Court in no way indicated that in a Section 15(7) investigation the Commission should disregard the statutory standards for determining the lawfulness of rates.

5. Whether the District Court erred in rejecting or ignoring the Commission's conclusion that approval of the proposed rates notwithstanding the distance and cost disadvantages of the railroads serving the northern tier ports, would require approval of corresponding rate reductions proposed by the railroads serving the southern tier ports to maintain the differentials at a lower rate level, thereby producing destructive competition and needless dissipation of carrier revenues?

This is a strange question to be propounded by the Commission. Is it going to abrogate its authority and distinct duty and obligation to prevent "destructive competition and needless dissipation of carrier revenues"?

It is fundamental that if the appellee railroads lawfully reduce their rates to a basis of equality with the rates of appellant railroads as a matter of necessity in order to meet competition, then a retaliatory reduction by appellants must be condemned as "unnecessary to meet competition".

This question was dealt with in *U. S.* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499 (1935), at pages 509-10, where this Court stated:

"The point of the decision is not that present rates are sound, but that they must be maintained, even if unsound, for fear of a rate war which might spread beyond control. The danger is illusory. The whole

situation is subject to the power of the Commission, which may keep the changes within bounds. If Illinois lines attempt to lower their rates again, a proceeding will be available to maintain a fair relation. If the lines in Kentucky, operating in interstate commerce, apply for new reductions, the supervisory power of the Commission will subject them to the rule of reason. But other remedies even more plainly adequate are at hand in case of need. Under § 15 of the statute the Commission of its own motion may conduct a comprehensive inquiry into the rates of all the lines within the area of controversy, may fix the fair relation between one line and another, and may build the structure of the rates accordingly. *Florida* v. *United States*, 292 U. S. 1; *United States* v. *Louisiana*, 290 U. S. 70."

Thus, the retaliatory reductions published by the Baltimore and Philadelphia carriers on export grain from Buffalo, Oswego and Ogdensburg, after this Court in *New York Cent. R. Co.* v. *United States*, 99 F. Supp. 394 (1951), aff'd 342 U. S. 890, had set aside a Commission order which condemned rate equalization, were held unlawful and ordered cancelled in *Export Grain From Buffalo to New York*, 292 I.C.C. 647 (1954), the Commission pointing out at page 658 that the carriers' rate-making discretion must yield to its power to require the maintenance of a lawful rate structure and to prevent unnecessary wasting of their revenues.

In *Iron Ore, Ex-Labrador, Canada to Youngstown, Ohio*, 302 I.C.C. 109 (1957), the Commission again condemned retaliatory reductions, stating at pag 117:

"The continuance of a relationship which prevents the movement of any of this traffic over the rail route from Contrecoeur would defeat the purpose of the rate proposed from that point and perpetuate the lack of competitive balance. There is no showing that

the proposed reduction from Philadelphia is required by any existing competition. The proposed reduction from Philadelphia is disapproved for the reason that it would result in a rate war and in needless dissipation of greatly needed carrier revenue, and thus constitute an unfair and destructive competitive practice in contravention of the national transportation policy."

Accordingly, the Commission's authority is most adequate to condemn the appellee railroads' retaliatory reductions.

CONCLUSION

Since it is evident that the appeals herein present questions which are neither novel nor substantial, it is respectfully submitted that the judgment and decree of the District Court should be affirmed.

Respectfully submitted,

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Appendix 1

United States District Court

DISTRICT OF MASSACHUSETTS

Civil Action No. 61-38-S

BOSTON AND MAINE RAILROAD and THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants.

Before: WOODBURY, Chief Judge, United States Court of Appeals, SWEENEY, Chief Judge, United States District Court, and FORD, United States District Judge.

OPINION OF THE COURT

February 16, 1962

SWEENEY, Ch. J. The plaintiffs—Boston and Maine Railroad and The New York, New Haven and Hartford Railroad Company—brought this action pursuant to 28 U.S.C., §§ 1336, 2284, 2321 and 2325, to set aside and enjoin enforcement of an order of the Interstate Commerce Commission, Investigation and Suspension Docket No. 6615, Equalization of Rates at North Atlantic Ports, 311 I.C.C. 689, denying a fourth-section application and cancelling new rate schedules filed by the plaintiffs and their connecting carriers,[1] in which they proposed to reduce rates

[1] The Delaware and Hudson Railroad Corporation, Erie-Lackawanna Railroad Company, Grand Trunk Railway System-Lines-East, The New York Central Railroad Company, New York, Susquehanna and Western Railroad Company.

on export and iinport traffic[2] between the ports of New York and Albany, New York, Boston, Massachusetts, and Portland, Maine, hereinafter referred to as northern tier ports, on one hand, and affected territory[3] on the other. The proposal was designed to place on a parity the rates on this traffic through these ports with rates on like traffic through the southern tier ports.

The original defendants are the United States and the I.C.C. Other railroads and various port and commercial interests have intervened on both sides.[4]

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[2] Except iron ore, coal, and coke which is a direct product of coal.

[3] It includes territory on and west of a line extending from a point just west of Buffalo through Warren, Oil City, Butler, Pittsburgh, and Washington, Pa., Wheeling, W. Va., thence along the east bank of the Ohio River to Kenova, W. Va., including points in West Virginia, Charleston and west thereof, certain points in Kentucky on the lines of The Chesapeake and Ohio Railway Company, and points on the south bank of the Ohio River from Huntington, W. Va., to Cincinnati, Ohio.

[4] The intervening plaintiffs include the Massachusetts Port Authority; the Port of New York Authority; the State of New York; the City of New York; Brooklyn Chamber of Commerce, Inc.; Belleville Manufacturers' Association; Bergen County Chamber of Commerce; Bronx Board of Trade; Chamber of Commerce, Garfield, N. J.; Chamber of Commerce, Irvington, N. J.; Chamber of Commerce of Eastern Union County; Clifton Chamber of Commerce; Commerce and Industry Association of New York, Inc.; Hoboken Chamber of Commerce; Ironbound Manufacturers' Association, Inc.; The Maritime Association of the Port of New York; Newark Association of Commerce and Industry; New Jersey Industrial Traffic League, Inc.; Queensborough Chamber of Commerce; The Shippers Conference of Greater New York; The West New York Chamber of Commerce; West Side Association of Commerce in the City of New York; and the railroads listed in paragraph one.

The intervening defendants include the Baltimore and Ohio Railroad Company; Canton Railroad Company; The Chesapeake and Ohio Railway Company; Norfolk and Western Railway Company; The Pennsylvania Railroad Company; Reading Company; Western Maryland Railway Company; the Delaware River Port Authority; the Virginia State Ports Authority; Norfolk Port and Industrial Authority; City of Philadelphia; Maryland Port Authority; Baltimore Association of Commerce; and the Maine Central Railroad Company.

Appendix 1

The differences in existing rail rates on import and export traffic are shown below.

Port	Differentials, in cents per 100 pounds					
	Classes					
	1	2	3	4	5	6
Import traffic						
Canadian ports (same as Baltimore)	..	..	..	..	..	..
Portland (Baltimore rates via Canadian routes; New York rates via standard routes)	..	..	..	..	..	..
Boston (same as New York)	..	..	..	..	..	..
Albany (Philadelphia rates, subject to domestic rates as maxima)	..	..	..	..	..	..
Philadelphia under New York	6	6	2	2	2	2
Baltimore under New York	8	8	3	3	3	3
Hampton Roads[1] (same as Baltimore)	..	..	..	..	..	..
Export traffic						
Canadian ports:						
Halifax, St. John, et cetera (same as New York)	..	..	..	..	..	..
Montreal (same as Philadelphia)	..	..	..	..	..	..
Portland	..	..	..	..	..	..
Boston (same as New York)	..	..	..	..	..	..
Albany (Philadelphia rates, subject to domestic rates as maxima)	..	..	..	..	..	..
Philadelphia under New York:						
Grain, 0.5 cent under N. Y. Flour, 1 cent under N. Y.	2	2	2	2	2	2
Baltimore under New York:						
Grain, 1.5 cents under N. Y. Flour, 2 cents under N. Y.	3	3	3	3	3	3
Hampton Roads[2] (same as Baltimore)	..	..	..	..	..	..

[1] To territory west of the Sandusky, Mansfield, Zanesville, Marietta line.

[2] From territory west of the Sandusky, Mansfield, Zanesville, Marietta line.

Appendix 1

The differentials were the result of an agreement entered into by North Atlantic port railroads in 1877. At that time ocean rates to Philadelphia and Baltimore were higher than to the northern tier ports and the object of the agreement was "to avoid misunderstanding as to the geographical advantages or disadvantages of New York, Philadelphia, and Baltimore as affected by railroad-ocean transportation, and to effect an equalization of rail-ocean transportation cost between interior points and foreign ports reached through these cities." Boston rates, under this agreement, were to be no less than those to and from New York.

Beginning in the early 1920's and extending to about 1935, ocean rates to and from the different ports gradually were equalized and the total transportation charge through the northern tier ports consequently became higher than the combined cost of rail and ocean transportation through a southern tier port. It is this competitive disadvantage which the plaintiff railroads sought to remove with their proposed rate schedule.

By schedules filed to become effective simultaneously with those of plaintiffs, certain railroads which serve the southern tier ports and, in some instances, also New York, proposed to reduce their rates by the same amounts. This counterproposal, which was to take effect only if the plaintiffs' schedules were allowed, would restore the differential at a lower level.

Upon protests of each group to the other proposal, the I.C.C. suspended both schedules and instituted an investigation into their lawfulness. After hearing and review by the Commission, it issued the order from which this appeal was taken, denying the fourth-section application and cancelling the plaintiffs' proposed schedule on the findings that the "proposed rates are not shown to be reasonably related to the present rates on like traffic between the same interior points and the southern tier ports"; that they "would result in undue preference of and advantage to the northern tier ports as a group and in undue prejudice and

disadvantage to the southern tier ports," and that they "are not shown to be just and reasonable." Equalization of Rates, *supra*, at 741, 742.

In its answer to the complaint in this action the United States admitted that the Commission's order was erroneous in that it treated the proposal vis-a-vis the northern tier ports as a group and failed to consider the lawfulness of the proposed rates as to each port separately. As a result, the Commission reopened the proceedings "for reconsideration on the present record of the lawfulness of the proposed rates separately and independently on traffic to and from each northern tier port." The proceedings in this court were held in abeyance pending this decision.

On reconsideration the Commission affirmed its original holding and also found that the greater distance of the northern tier ports from affected territory over Baltimore and Philadelphia "may not be ignored without running counter to the provisions of section 3(1) of the Act," p. 21, Recon.[1] Moreover, it found "so far as New York is concerned, rate equalization is not required to enable that port to meet the competition of the southern tier ports, and that, so far as Boston, Portland, and Albany are concerned, such equalization would not materially affect the flow of foreign traffic through any of these ports," p. 21, Recon.

The Commission's decision is attacked here generally as being erroneous in law, unsupported by essential basic findings and unsupported by substantial evidence on the record as a whole.

The specific object of attack by the plaintiffs in this proceeding is the Commission's conclusion of a section 3(1) violation, and the weight the Commission attached to the sole subsidiary finding upon which this conclusion is based—that the northern tier ports have a distance disadvantage

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[1] Page references so designated are to the mimeographed copy of the Report of the Commission on Reconsideration.

over Baltimore of from 223 miles in the case of Boston to 117 miles in the case of New York.

It is admitted by the plaintiffs that the function of a court reviewing an administrative decision is a limited one. The general rule is that "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body," *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286-7 (1934), and specifically "the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power or (3) based upon a mistake in law." *I.C.C.* v. *Union Pacific R.R.*, 222 U. S. 541, 547 (1911). Further, an order cannot be sustained unless supported by essential basic facts particularly stated. *Atchison T. & S. F. Ry.* v. *United States*, 295 U. S. 193 (1935); *United States* v. *Chicago, M., St. P. & P. R.R.*, 294 U. S. 499 (1935).

Under 49 U.S.C. § 15(7), the plaintiffs had the burden of proof to show that the proposed rates are "just and reasonable" within the meaning of section 1(5), free from unjust discrimination prohibited by section 2 and that they contain no undue preference or prejudice proscribed by section 3(1).

The evidence before the Commission showed and the Commission found that the four northern tier ports experienced a relative decline in the participation of total United States foreign tonnage in the period 1923-55, while the relative share of the southern tier ports increased markedly during the same period. Thus, even while the foreign traffic through New York during this period rose from 22.6 million gross tons to 36.2 million gross tons, its share of the total United States tonnage declined from 28.6 per cent to 14 per cent. Boston's participation dropped similarly from 4.7 per cent to 2.5 per cent. On the other hand the share of the southern tier ports of total

United States imports and exports increased as follows: Philadelphia from 7.9 to 15.7 per cent, Baltimore from 8.4 to 10.4 per cent and Hampton Roads from 4.3 to 17.1 per cent.

Since these figures are not limited to affected territory traffic, nor even to rail tonnage, they are by no means conclusive proof of the plaintiffs' position; but they do serve as an indication of the trend in import-export traffic movement. In order to present a clearer and more complete picture of comparative traffic between all North Atlantic ports and affected territory the railroads conducted traffic studies during 1955-56 which showed that 75.8 per cent of imports and 63.7 per cent of exports (measured by carloads) moved through the southern tier ports. Similar, but incomplete studies for the years 1946 and 1947 tentatively indicate that a downward trend of import-export traffic to affected territory on the lines serving New York exists.

The Commission points out that New York still clearly dominates general cargo traffic and that the preponderance of southern tier traffic consists of bulk cargo[1] which prefers these ports because of their modern, specialized facilities and services. It is also apparent, however, that bulk cargo is necessarily more sensitive to rate differentials and the Commission implicitly so acknowledges by noting that the equalization of ex-lake rates on grain from Buffalo has resulted in a shift of the relative shares of that traffic in

[1] "Ocean borne commerce is classified into two types of cargo. By far the largest in volume is bulk cargo. It consists generally of low-value heavy volume raw materials which are handled at the port by mechanical facilities and provide bottom loading for ships or may move as full cargoes. The other type, called general cargo, includes principally manufactured and semimanufactured goods of relatively high value, which are usually packaged. General cargo generally constitutes the more profitable 'top loading' for ships in a balanced cargo operation." Equalization of Rates, *supra*, at 700.

favor of the northern tier ports. Moreover, New York's dominance in general cargo traffic is not sufficient reason for denying it and the railroads serving it the opportunity to compete for bulk cargo traffic, as "both types of cargo are considered essential to a healthy port economy." Equalization of Rates, *supra*, at 701.

There was, furthermore, extensive evidence from shippers, both private and representatives of various agencies of the United States, that the differential adjustment is a controlling consideration in their choice of ports. These witnesses supported equalization and testified to the need to provide relief from congested ports, bunching and inefficient utilization of cars and delays in the flow of traffic.

In addition to this evidence indicating the importance of the differential and showing the necessity for its removal, the plaintiffs presented proof that the proposed rates are just and reasonable. In view of the minimal amounts of the proposed reductions (reduction in revenue from Chicago to Boston would be .08 cents per ton-mile on first-class traffic and .10 cents on Column 13 traffic, for example), the plaintiffs relied on a prima facie showing of revenues. There was testimony that, using representative origins and destinations and the proposed rates, for 96.8 per cent of all tonnage moving through the port of New York, the import traffic averaged a rate per ton of $19.20 and revenues per ton-mile of 2.47 cents, and that for export traffic these figures were $18.00 and 2.32 cents. In comparison the average revenue per ton-mile for Class I railroads in the United States is 1.384 cents.

The defendant railroads countered this evidence by showing that with respect to traffic through the port of New York the proposed rates were insufficient to return out-of-pocket costs. But, while it refused to find the rates compensatory, the Commission did find after restating and adjusting the cost evidence, that "the revenue from the proposed rates would equal or exceed by a very small mar-

gin the estimated out-of-pocket costs." Equalization of Rates, *supra*, at 735.

On this evidence the plaintiffs certainly established prima facie that the proposed rate schedule is just and reasonable. We now turn to the Commission's disposition of the case. As noted above, it disallowed the proposal principally on the ground that the rates would violate section 3(1). This section provides that

> "It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway . . . or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway . . . or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever . . ."

In one of the earliest cases to come before the Supreme Court under this Act, the Court said that when presented with a question of unjust discrimination, the Commission is to "take into consideration all the facts of the given case—among which are to be considered the welfare and advantage of the common carrier, and of the great body of the citizens of the United States . . . The Commission is not only to consider the wishes and interests of the shippers and merchants of large cities, but to consider also the desire and advantage of the carriers in securing special forms of traffic, and the interest of the public that the carriers should secure that traffic, rather than abandon it, or not attempt to secure it." *Texas & Pac. Ry.* v. *I.C.C.*, 162 U. S. 197, 218 (1896). In 1940, Congress, by adding

the National Transportation Policy, 49 U.S.C., affirmed and reiterated the view that the Act must be interpreted as a whole and the competing interests of shippers, carriers, and localities carefully balanced "to the end of developing a national transportation system . . ."

While apparently recognizing these principles, the Commission, in this case, nonetheless wholly ignored them. It noted the voluminous testimony of shippers and receivers in favor of equalization, but in its conclusions completely disregarded this evidence. It considered the need of the plaintiffs and their competitive disadvantage, but discounted both in its findings. Its final decision rests solely on the proposition that some ports would be unduly preferred and others unduly prejudiced by the proposed rates.

In emphasizing the welfare of ports and port districts, the Commission apparently relied on the 1935 amendment to section 3(1) which added "ports, port districts, gateways and transit points", to the interests protected by that section.

In *Texas & Pac. Ry.* v. *United States*, 289 U. S. 627 (1933), the Supreme Court had held that the word "locality" referred to "points of origin or destination" and did not include gateways. The purpose of the amendment was only to restore to the Commission a power which it had previously exercised, but which the Supreme Court had held the Commission did not have. Neither the legislative history nor the plain words of the amendment indicate that any change in the prevailing rules respecting undue preference and prejudice or any special treatment of ports and port districts was intended.

We find that the Commission erred in applying section 3(1) too narrowly and in not giving due weight to the interests of shippers, receivers, carriers, and inland localities.

The Commission in reaching the conclusion that the proposed rates violate section 3(1) relies on a single sub-

sidiary finding—the distance disadvantage of the northern tier ports. In the light of the history of the differential, earlier decisions of the Commission concerning it, the original report issued in this case, and the facts of this case, this finding in the Report on Reconsideration and its import are somewhat difficult to understand and, in view of the applicable law, erroneous. In the first place, the differential was established to place all North Atlantic ports on a parity with respect to the aggregate of rail and ocean charges. No consideration whatever was given to disparity in rail distances then or later. On the contrary, when the Thurman-Cooley-Washburn Advisory Commission concluded in 1882 that the differentials should remain, it specifically rejected the "distance principle" as controlling port relationships and rested its award on the principle of "competitive opportunity."

Until it filed its Report on Reconsideration in this proceeding, the Commission, itself, has continually adhered to the proposition that distance plays no part in the determination of port differentials. It so stated even in its original report: "Such distance disadvantages as they (the northern tier ports) have are much less than the substantial differences to and from some other ports which have a parity or near parity of rates, including the Canadian ports, and the wide differences which obtain where the several South Atlantic and Gulf ports are equalized. . . . It is apparent that considerable disregard of rail distances is characteristic of all port adjustments, as it was in the establishment of the rates here dealt with." Equalization of Rates, *supra*, at 715, 716.

Even while proclaiming this new rule the Commission ignores it. Import rates from Portland may remain on a parity with Baltimore in spite of a distance disadvantage of more than 300 miles. Moreover, the present differentials do not in any way reflect the distance differences.

Secondly, one of the purposes of the 1935 amendment to section 3 was, as the Commission had previously pointed out, Equalization of Rates, *supra,* at 716 and cites therein, to permit all ports and the carriers serving them to compete for all import and export traffic and thereby maximizing the number of ports available. The finding in this case, if pressed to its logical conclusion, would result in traffic flowing only through the most distance favored port. On the other hand, if applied only in this case, the decision is arbitrary and capricious.

Thirdly, the Commission has failed to distinguish between rates which carriers may voluntarily publish to meet competition pursuant to section 15(7) and rates which carriers, on complaint under section 3(1) may be required to change. It is now well established that carriers may, within the zone of reasonableness, adjust rates to meet competition—*United States* v. *Chicago, M., St. P. & P. R.R.*, 294 U. S. 499, 506 (1935); *Texas & Pac. Ry.* v. *United States*, 289 U. S. 627, 636 (1933); *New York Cent. R.R.*, v. *United States*, 99 F. Supp. 394 (D. C. Mass. 1951)—in which case the issue to be decided is whether the *proposed* rates are lawful. In a complaint proceeding the question is whether the *existing* rates are lawful and, if not, whether they should be required to be changed. However, both the Report and the Report on Reconsideration give continuous indication that the Commission regarded this as a "port" case, not a "railroad" case. For example, the observation that "in the rare instances where rate changes in port relationships have been required by us, distance has been an important consideration," p. 21, Recon., while perhaps true, was totally irrelevant to the issues before it. Distance differences might be relevant insofar as they reflect differences in the cost and value of the services of plaintiff and defendant railroads, see *United States* v. *Illinois Cent. R.R.*, 263 U. S. 515, 524 (1924), but the Commission made no such cost or value findings nor does the record contain

evidence from which it could make such findings. We must, therefore, rule that its conclusion lacks the required basic findings to support it.

The Commission disapproved the plaintiffs' proposal on the additional ground that, insofar as New York is concerned, equalization is not necessary to enable that port to compete. This conclusion again is based on a misunderstanding of the nature of the proceedings. While the New York Port Authority and other New York governmental and commercial interests were undoubtedly active participants in the case, the primary issue is whether equalization is necessary to enable the plaintiff railroads to compete. And the evidence showed that the share of traffic handled by these railroads has been declining.

The last reason given in support of its decision is that with respect to the ports of Boston, Albany and Portland, "equalization would not materially affect the flow of traffic to these ports." Not only does this statement completely contradict the Commission's ultimate conclusion of undue prejudice to the southern tier ports, but it ignores the plaintiffs' right to attempt to gain some of this traffic for their lines.

We, therefore, conclude that the Commission's decision is erroneous in law and lacks the rational basis necessary to uphold it and it must be set aside. A judgment may be entered setting aside the order of the I.C.C. and issuing a permanent injunction as prayed for.

/s/ PETER WOODBURY,
Chief Judge, United States Court of Appeals.

/s/ GEORGE C. SWEENEY,
Chief Judge, United States District Court.

/s/ FRANCIS J. W. FORD,
United States District Judge.

Appendix 2

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action No. 61-38-S

Boston and Main Railroad and The New York, New Haven and Hartford Railroad Company,

Plaintiffs,

v.

United States of America and Interstate Commerce Commission,

Defendants.

Before WOODBURY, Chief Judge, United States Court of Appeals, SWEENEY, Chief Judge, United States District Court, and FORD, United States District Judge.

JUDGMENT

In accordance with the opinion of the Court handed down on February 16, 1962, it is hereby ORDERED

The order of the Interstate Commerce Commission of December 5, 1960, insofar as it directs the cancellation of schedules proposing differential-eliminating rates to and from the Ports of Portland, Maine, Boston, Massachusetts, Albany and New York, New York, denies fourth-section application No. 32204, and prevents differential-eliminating rates from becoming effective

is set aside and the operation, enforcement and execution thereof is permanently enjoined.

By the Court,

/s/ HELEN I. TWEEDY,
Deputy Clerk.

Approved:

/s/ PETER WOODBURY

/s/ GEORGE C. SWEENEY

/s/ FRANCIS J. W. FORD

Judgment entered February 4, 1962.

JOHN A. CANAVAN,
Clerk,

By /s/ HELEN I. TWEEDY,
Deputy Clerk.

Appendix 3

HOUSE OF REPRESENTATIVES

74TH CONGRESS } REPORT
1st Session } No. 1512

AMEND PARAGRAPH (1) OF SECTION 3 OF THE INTERSTATE COMMERCE ACT

July 12, 1935—Referred to the House Calendar and ordered to be printed

MR. CORNING, from the Committee on Interstate and Foreign Commerce, submitted the following

REPORT

(To accompany S. 1633)

The Committee on Interstate and Foreign Commerce, to whom was referred the bill (S. 1633) to amend the Interstate Commerce Act, as amended, and for other purposes, having considered and amended the same, report thereon with a recommendation that it pass.

Amend the bill as follows:

Page 1, line 6, strike out the word "part" and insert in lieu thereof "Act".

Amend the title so as to read:

A bill to amend the Interstate Commerce Act, as amended.

The purpose of the bill S. 1633 is to restore to the Interstate Commerce Commission the power to remove undue preference or prejudice against ports which it had exercised for many years prior to the five-to-four decision of the Supreme Court in Texas & Pacific Ry. Co. et al. v.

United States (289 U.S. 627, May 29, 1933), holding that the word "locality" in paragraph (4) of section 3, did not include a "port" with respect to export and import traffic routed through such a port. The majority opinion of the Court held that the word "locality" referred to "points of origin or destination". The minority opinion of Mr. Justice Stone, concurred in by three other justices, pointed out that the "commercial interests of a port, always of great magnitude, may suffer the same destruction from discriminatory rates as do shippers or other industrial interests at points of origin or destination."

At the hearings held before a subcommittee of the Committee on Interstate and Foreign Commerce of the House on June 12 and June 18, 1935, and before a subcommittee of the Interstate Commerce Committee of the Senate on March 26, to 28, 1935, witnesses representing the ports of New York, Massachusetts, New Jersey, Pennsylvania, Maryland, Virginia, California, Oregon, Texas, and other States, appeared in support of the Bills H.R. 5361 and S. 1633 introduced, respectively, by Representative Rayburn and Senator Wheeler upon request of Federal Coordinator Eastman.

Representatives of the shippers also favored the bills which were opposed only by representatives of the port of New Orleans, of the Texas interior points of origin, and the two railroads which were involved in the Supreme Court decision. The bill (S. 1633) included only "ports" and "gateways", while S. 1813 included, in addition "port districts" and "transit points." The Interstate Commerce Commission recommended the addition of these words to S. 1633 and the Senate committee adopted amendments which the Senate approved, adding these words in line 10 on page 1 and line 2 on page 2 of that bill.

Paragraph (4) of section 3 of the act was enacted as section 3 of the original act to regulate commerce, February 4, 1887, and its language has remained unchanged

throughout the intervening years. Until 1929 no doubt was ever entertained that the word "locality" was broad enough to include any place, including a port; and the commission heard and decided many cases involving ports under that language.

In 1929 the Commission determined a controversy between the ports of New Orleans and Galveston partially in favor of Galveston, which had complained that certain railroad rates on export traffic denied it the advantage of its closer distance to Texas origins and discriminated against it in favor of New Orleans, which was farther away from these points. That case was carried to the Supreme Court and resulted in the May 1933 decision limiting the meaning of the word "locality" to points of origin or destination. Thereafter the Seventy-third Congress and this Congress have had a number of bills introduced to correct the situation by amending the paragraph in question so as to restore to the ports a right to complain of rail rates through the ports and to permit the Commission to entertain and decide such complaints.

The same consideration requiring such relief of the ports motivates the granting of similar relief to port districts, gateways, and transit points which otherwise could be discriminated against by the rail rates on traffic through them, without opportunity to complain.

In recommending that this bill be passed, the committee does so with the idea in mind that by amending section 3 of the Interstate Commerce Act as thus contemplated it will encourage and promote the freedom of movement of export, import, and coastwise commerce through the ports of the country. The committee considers that it is to the interest of the public that such commerce be permitted to move freely through as many available ports as the governing circumstances will reasonably permit, and that no restrictions upon and impediments to the free movement thereof should be imposed that are not clearly

shown to be sound or economically justified. The recommendation of the committee that this bill be enacted is intended to afford competing ports a forum in which to complain of rate adjustments which tend to concentrate the movement of the traffic through one port or a limited number of ports and to deprive other ports of an opportunity to handle a part of such traffic. The committee believes that such a diffusion of the traffic which moves through the ports will redound to the benefit of the producer and consumer in the interior by whom in the last analysis the transportation charges levied both for the transportation thereof and for the use of the facilities at the ports are ultimately borne.

Appendix 4

SENATE

74TH CONGRESS, 1st Session — CALENDAR No. 932, Report No. 885

TO AMEND PARAGRAPH (1) OF SECTION 3 OF THE INTERSTATE COMMERCE ACT

May 13 (calendar day, June 14), 1935—Ordered to be printed

MR. MOORE, from the Committee on Interstate Commerce, submitted the following

REPORT

(To accompany S. 1633)

The Committee on Interstate Commerce, to whom was referred the bills (S. 874, S. 1633, and S. 1813) to amend paragraph (1) of section 3 of the Interstate Commerce Act, as amended, having held hearings and considered the bills and having adopted certain amendments to S. 1633, report that bill back to the Senate with the recommendation that it be passed with amendments.

The purpose of the bill S. 1633 and of S. 874 and S. 1813, is to restore to the Interstate Commerce Commission the power to remove undue preference or prejudice against ports which it had exercised for many years prior to the five-to-four decision of the Supreme Court in Texas & Pacific Ry. Co. et al. v. United States (289 U.S. 627 May 29, 1933), holding that the word "locality" in paragraph (1) of section 3, did not include a "port" with respect to export and import traffic routed through such a port. The majority opinion of the Court held that the word

"Locality" referred to "points of origin or destination." The minority opinion of Mr. Justice Stone concurred in by three other justices, pointed out that the "commercial interests of a port, always of great magnitude, may suffer the same destruction from discriminatory rates as do shippers of other industrial interests at points of origin or destination." (see page 28 of subcommittee hearings.)

At the hearings held on these bills on March 26 to 28, 1935, the bill (S. 1633) introduced by Senator Wheeler at the request of Coordinator Eastman and the Interstate Commerce Commission, was supported by witnesses representing the ports of Massachusetts, New York, New Jersey, Pennsylvania, Maryland, Virginia, Texas, and Oregon.

Representatives of the shippers also favored the bills which were opposed only by representatives of the port of New Orleans, of the Texas interior points of origin, and the two railroads which were involved in the Supreme Court decision. The bill (S. 1633) included only "ports" and "gateways", while S. 1813 included in "port districts" and "transit points." The Interstate Commerce Commission recommended the addition of these words to S. 1633 and the committee adopted amendments adding these words in line 10 on page 1 and line 2 on page 2 of that bill.

Paragraph (1) of section 3 of the act was enacted as section 3 of the original act to regulate commerce, February 4, 1887, and its language has remained unchanged throughout the intervening years. Until 1929 no doubt was ever entertained that the word "locality" was broad enough to include any place, including a port and the commission heard and decided many cases involving ports under that language. In 1929 the Commission determined a controversy between the ports of New Orleans and Galveston partially in favor of Galveston, which had com-

plained that certain railroad rates on export traffic denied it the advantage of its closer distance to Texas origins and discriminated against it in favor of New Orleans, which was farther away from these points. That case was carried to the Supreme Court and resulted in the May 1933 decision limiting the meaning of the word "locality" to points of origin or destination. Thereafter the Seventy-third Congress and this Congress have had a number of bills introduced to correct the situation by amending the paragraph in question so as to restore to the ports a right to complain of rail rates through the ports and to permit the Commission to entertain and decide such complaints.

The same considerations requiring such relief of the ports motivates the granting of similar relief to port districts, gateways, and transit points which otherwise could be discriminated against by the rail rates on traffic through them, without opportunity to complain.

The committee respectfully urges passage of the bill S. 1633, as amended.

Certificate of Service.

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, and also the Solicitor General, Department of Justice, Washington 25, D. C., by mailing by first-class mail a copy thereof properly addressed to each of such parties.

Dated at New York, N. Y., this 9th day of May, 1962.

JOHN H. COLGREN.